(6)

Supreme Court of the United States

No. 213

Term A. D. 1944.

F. G. BADENHAUSEN, WILLIAM S. SPATCHER and HOWARD H. HUBBARD, constituting the Protective Committee for the Holders of Georgia and Alabama Railway First Mortgage Consolidated Five Percent Gold Bonds,

Petitioners and Appellants Below,

AGAINST

OTIS A. GLAZEBROOK, JR., JOSEPH FRANCE and CHARLES MARKELL, as the Reorganization Committee of the Seaboard Air Line Railway Company, *et al.*,

Respondents and Appellees Below.

PETITION AND BRIEF FOR WRIT OF CERTIORARI.

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CASES CITED.

STATUTES CITED.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of F. G. Badenhausen, William S. Spatcher and Howard H. Hubbard, constituting the Protective Committee for the Holders of Georgia and Alabama Railway First Mortgage Consolidated Five Percent Gold Bonds, respectfully shows:

Summary Statement of the Matter Involved.

The petitioners seek a review of the final determination of the Circuit Court of Appeals for the Fifth Circuit dated April 10, 1945, which affirmed the decree of the District Court of the United States for the Southern District of Florida entered September 14, 1943, confirming and approving the Report of the Special Master and the Special Master's Plan of Reorganization together with the modifications made by the District Courts.

Petitioners herein constitute a protective committee duly authorized by the Interstate Commerce Commission to represent and act for the holders of Georgia and Alabama Railway First Mortgage Bonds, one of the underlying first mortgage issues of the Seaboard System.

Facts as to Seaboard System.

The system of railroads known as the Seaboard Air Line Railway (hereinafter called "Seaboard") consists of about 4,000 miles of railroad operating in the fourth and fifth judicial circuits. Receivers were appointed for the Seaboard by the United States District Court for the Eastern District of Virginia ("Virginia Court") in proceedings instituted by a general creditor. The defendant, Seaboard Air Line Railway Company, consented to the receivership. Ancillary proceedings were instituted on the same day in the District Court of the United States for the Southern District of Florida ("Florida Court").

From time to time, and in subsequent years, foreclosure bills were filed in those proceedings by the trustees under the various mortgages secured by property owned by the Seaboard. The causes have been consolidated.

Included in the 4,000 miles of railroad presently owned or operated by the Seaboard System are over 2,000 miles which are subject to ten separate *underlying* divisional mortgages originally created by predecessor companies

prior to the merger and consolidation of the Seaboard System. The total of principal and unpaid interest on these "underlying mortgages" held by the public (as of January 1, 1943) amounted to $48,550,000.*

Subordinate to these underlying liens, but constituting first liens on certain portions of the whole railroad system, are four *general* mortgages. The total principal and interest of these general mortgage bonds publicly held (as of January 1, 1943) aggregated $160,400,000. During the course of the Receivership, the Receivers incurred obligations aggregating in all $38,413,000. In addition, there were $36,800,000 of Seaboard collateral trust obligations and other general unsecured claims. The grand total of principal and interest of the secured debt in the hands of the public was $340,250,000, exclusive of capital stock. The par value of the outstanding capital stock of the Seaboard, preferred and common, aggregated $85,110,000.**

During the years 1942 and 1943, the Receivers purchased and acquired about *$34,000,000* par value of outstanding Receivers' certificates and other secured obligations of the System *from wartime earnings.* Nearly all of the securities were so acquired under orders of the Court to the effect that the application of the monies therefor should be without prejudice to the claims of parties in interest with respect to the monies so used. During the Receivership, and prior to 1943, the Receivers also applied upwards of $50,000,000 in betterments to the Railroad System.

On October 27, 1939, the "Virginia Court" entered an order appointing Tazewell Taylor, Esq., as Special Master, to prepare and submit a plan of reorganization after hearings of all parties in interest. A similar order

*To avoid confusion, round figures will frequently be used.

**The District Courts found the Seaboard insolvent. The Adjustment Mortgage bonds which were junior to the Refunding Mortgage, the unsecured debt and stock of the Seaboard were not entitled to participate in the reorganization because the new capitalizaion would be insufficient to fully satisfy the claims of the holders of the secured debt (R. Vol. I, 91).

was entered by the "Florida Court". The Special Master conducted hearings at various times commencing March 4, 1940 and terminating on July 24, 1942, considered various plans of reorganization, and on July 20, 1943, submitted his Report and Plan of Reorganization.

After the receipt of the Report, exceptions and objections to the Special Master's Report were filed by many parties, including the petitioners herein. A hearing on those exceptions was set for October 25, 1943. At that hearing, Judge Chesnut (designated to take charge of the proceedings in the "Virginia Court" on account of the illness and subsequent death of Judge Way) and Judge Akerman, of the "Florida Court", *sat jointly*. Hearings were held on the objections and further evidence was submitted during the period from October 25th to November 5th, 1943.

At the conclusion of the hearings on the objections to the Plan, the District Courts rendered their tentative decision, and then discussed the practical or business aspect of deciding the issues before the Courts on a *compromise basis* rather than on a legal or judicial basis, in order to expedite the reorganization at that particular time when the earnings of the System were at their highest level (R. Vol. I, 365-368). The Courts suggested that a "Compromise Committee" be appointed to negotiate with the interested parties whose rights appeared to be adversely affected by the Master's Plan, so that a plan of reorganization could be confirmed that would be agreeable *by consent* to *all* interested participating parties (R. Vol. I, 365-368; see original Court transcript, pp. 1369-1386).

All participating parties agreed that a compromise would be the best method of expediting the reorganization, if *all* interested parties could *agree* on a plan of reorganization. The Courts then appointed a "Compromise Committee", consisting of three representatives of *certain* secured creditors, to confer with all the interested par-

ticipating parties and to compromise, if possible, all the conflicting claims before the next court hearing. The committee consisted of the two attorneys representing the Trustees and Bondholders' Protective Committee, respectively, of the First and Consolidated 6% Seaboard System Mortgage; the third member was counsel for the Underlying Bondholders' Committee, which held on deposit bonds of all ten underlying mortgage divisions and purported to represent all ten of these secured issues.

The "Compromise Committee", between the hearing on November 5th and the next hearing on November 29th, held separate conferences with the parties, purportedly considered the testimony and arguments presented at these conferences (called "hearings"), and finally recommended as a fair compromise to the District Courts *certain modifications* of the Plan proposed by the Special Master.

No agreement to compromise was ever entered into by any of the interested participating parties. The Compromise Committee adopted the attitude that it was functioning in a *judicial capacity* (R. Vol. I, Comp. Com. Exh. I, 415, 417, 418, 420).

At the hearings resumed on November 29th before the District Courts, and in their Report, the Compromise Committee gave no reasons for, nor did they explain, the methods by which they obtained the results they recommended, but stated that the results were obtained from the exercise of an *informed judgment* (R. Vol. I, 418). Mr. Wyer* (Underlying Committee's expert) testified that he *could not subscribe to the methods used* for obtaining the compromise, but was in favor of its results (Ct. Trans. p. 1416), and Mr. Kennedy* (First and Consolidated Mortgage expert) testified likewise. Thereafter, at the same hearing and in open Court, the Plan submitted by the Spe-

*These were the leading experts employed by the members of the Compromise Committee.

cial Master together with the modifications recommended by the "Compromise Committee" were adopted by the District Courts.

The paramount issue in the hearings before the District Courts on the Plan of Reorganization involved the equitable redistribution of the surplus securities (in excess of $34,000,000) and surplus funds released by the wartime earnings.

In contradistinction, the dominant issues in the hearings before the Special Master involved the capitalization of the new company and the segregation formula to be adopted to determine the earnings of the various divisions. The Special Master's hearings terminated on July 24, 1942. The problem, as to the distribution of the wartime earnings and the surplus securities released with those earnings, did not appear until some time thereafter.

As indicated during the years 1942 and 1943, the Receivers purchased and acquired $34,000,000 outstanding Receivers' Certificates and other secured obligations of the System (R. Vol. I, 90). These securities were purchased with funds principally acquired from huge wartime earnings accumulated during the years 1942 and 1943. The net earnings for the Seaboard System in 1941 were about $10,000,000. It was not until the year 1943 that it was ascertained that the net earnings for the Seaboard System for the year 1942 were $34,566,000, and subsequently that the net earnings for the Seaboard System for the year 1943 were about $28,000,000* (R. Vol. I, 96, 123).

After the close of the hearings before the Special Master, but before the Special Master filed his Report, the "Virginia Court", in order to simplify and expedite the reorganization, and as a step in reorganization, authorized the Receivers to acquire, out of available cash, a portion

*The estimated net earnings for the year 1944 were about $24,000,000 The gross earnings in 1943 and 1944 were as great or greater than 1942, but the net earnings less, due to increased Federal Taxes and increased labor costs

of the outstanding Receivers' Certificates, two of the ten issues of underlying bonds, a substantial part of the outstanding bonds of the Seaboard-All Florida Railway (a leased line of the System), and also certain collateral which had been pledged. Under Court orders, the purchased securities (about $12,000,000) were not to be cancelled, but were to be held for the benefit of the remaining secured creditors of Seaboard. The Special Master at the time he filed his Report in July, 1943, in order to dispose of these surplus securities, proposed a *Secondary Allocation* of these released securities among the various mortgage divisions of the System on the basis of their relative *earnings* indicated *during the period 1936 to 1940*, as shown by the "Kennedy Segregation Formula" which had been applied to this period (R. Vol. II; see Table I-B and Table II to the Special Master's Report).

After the filing of the Special Master's Report in July, 1943, the Virginia Court directed the additional purchase by the Receivers of the remaining outstanding Receivers' Certificates* (approximately $12,000,000 principal amount). That purchase, and certain other modifications of the Special Master's Plan providing for cash payments instead of the issue of securities to certain bond issues, released for redistribution the First Mortgage Bonds and certain junior securities originally allotted to the purchased securities in the Plan and to the securities for which cash payments were provided. The securities so released were in excess of $34,000,000.

The Special Master's Second Allocation proposed the redistribution of all these released securities among *only* those mortgage divisions which indicated segregated earnings during the pre-war period 1936 to 1940.

Several of the underlying mortgage divisions (including the Georgia and Alabama Railway) showed no segre-

*To which 30% in cash and 70% in First Mortgage Bonds had been allocated in the Plan recommended by the Special Master.

gated earnings during the pre-war period 1936 to 1940 under the adopted formula. On the other hand, these same mortgage divisions showed large segregated earnings during the years 1942 and 1943 (and unquestionably in 1944 and 1945). It was urged by the petitioners herein, and representatives of the other so-called deficit divisions, that since the cash available to make the payments which resulted in the release of the securities which were to be redistributed came from earnings of 1942 and 1943, and since in 1942 and 1943 the revenue had been so high that even the so-called deficit lines showed substantial earnings, it would be unfair to allocate these securities on the basis of the segregated earnings for the period 1936 to 1940 which was used for the Primary Allocation, since the System's earnings for 1942 and 1943 were in substantial part produced by the so-called deficit lines. Thus, under the theory and Second Allocation recommended by the Special Master, the Georgia and Alabama division, which had earned in 1942 in excess of $1,000,000* under the same formula (R. Vol. I, 411), and which, it had been estimated, earned in 1943 $1,500,000 to $2,000,000 (R. Vol. I, 370-371), would receive none of the securities released for redistribution (in excess of $34,000,000) because it had shown no earnings in the pre-war period 1936 to 1940.

In its Report, the Compromise Committee stated that it recognized the fundamental fairness and equity of providing for the distribution of normal earnings to holders of securities *whose properties have produced such earnings*, and also referred to similar recognized proposals in other proceedings (R. Vol. I, 419). The Committee purportedly gave effect to this principle by the use of a Third (Tertiary) Allocation, which it recommended to the District Courts as *a compromise*.**

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*This evidence was uncontroverted.

**All of the members of the Compromise Committee actively represented so-called "earning" divisions (which showed segregated earnings in 1936-1940) and benefited substantially in the reallocation of released securities under the methods they recommended which were adopted by the courts below.

The Tertiary Allocation, in effect, distributed approximately one-third (less than $12,000,000) of the new securities and cash released by the Receivers' recent purchases among all the various mortgage issues (including the Georgia and Alabama bonds) on the basis of the interest or dividends which would have been paid on the securities allotted to the respective issues if the Plan had gone into effect on January 1, 1942, including dividends of $3.50 per share on the new common stock.

On that basis, every secured issue participated equitably in the reallocation of released securities distributed under the 3rd Allocation, *but* the Tertiary Allocation was *not* applied to *all* the securities released for reapportionment by the wartime earnings. The Tertiary Allocation applied at most to *only one-third* of the new securities released; the bulk (more than two-thirds) of the securities and cash released were distributed under the Master's Secondary Allocation, which, in turn, was based entirely on the segregated earnings of each mortgage division indicated during the pre-war period 1936 to 1940. Thus, under the Secondary Allocation, a mortgage division which earned during the period 1942 and 1943 only 3% of the System's revenue, but which earned during the period 1936 to 1940 6% of the System's revenue, would receive 6% of the securities to be reallocated, whereas a division (such as the Georgia and Alabama) which earned during the period 1942 to 1943 3% or more of the System's revenue, but which earned during the period 1936 to 1940 no revenue, would receive none of the securities to be reallocated.

It will be noted that in effect the approved Plan of Reorganization consists of three separate allocations: the Primary and Secondary Allocations recommended by the Special Master, and the Tertiary Allocation recommended by the Compromise Committee, which partially modified the Secondary Allocation with respect to a small propor-

tion of the securities and cash released by the wartime earnings. It will be further noted that the Tertiary Allocation, in effect, distributes its released securities among the various mortgage divisions on the basis of the relative *values* found for these mortgage divisions in the two previous allocations made by the Special Master. The securities previously allocated to these divisions by the Primary and Secondary Allocations, not only fixed their relative values, but likewise determined the share they were to receive of the securities distributed under the Tertiary Allocation. If the Secondary Allocation was erroneous, as contended, the Tertiary Allocation multiplied the error.

Capitalization and Basis for Distribution of New Securities Under Approved Plan.

The capitalization* proposed for the new company by the Special Master and approved by the Courts below consisted of the following: $32,500,000 First Mortgage Bonds; $52,500,000 Income Bonds; $15,000,000 Preferred Stock; and $85,000,000 Common Stock; making a total capitalization in the sum of $185,000,000 of new securities to be apportioned among the various secured creditors of the System.

Primary Allocation.

(1) *Distribution of First Mortgage Bonds*: The Special Master recommended (and the Courts approved) that the Primary distribution of First Mortgage Bonds among the various secured issues should be made on the basis of their relative average earnings for the period 1936 to 1940, as shown by the application of the "Kennedy Segregation Formula". First Mortgage Bonds were distributed *only* to divisions showing earnings during this test period, and were apportioned relatively, in the ratios indicated by these earnings.

*Petitioners have not questioned the capitalization recommended by the Special Master and approved by the Courts below.

(2) *Distribution of Income Bonds*: The Special Master recommended (and the Courts approved) that the Primary distribution of Income Bonds should be made in the following manner: 50% were allocated (like the First Mortgage Bonds) among the various issues on the basis of their segregated earnings during the test period of 1936 to 1940; and the remaining 50% were allocated on the basis of the net value (after estimated out-of-pocket expenses) of freight contributions made by each of the various mortgage divisions to the System during the same test period.*

(3) *Distribution of Preferred and Common Stock*: The Preferred and Common Stock were also allocated to the extent of one-third thereof on the basis of segregated earnings indicated in 1936 to 1940; one-third on the basis of net value of traffic contributions; and one-third on the basis of physical value of property (reproduction costs new, less depreciation (R. Vol. II, 227-258).

Secondary Allocation.

After the close of the hearings before the Special Master but before he filed his Report, the "Virginia Court" authorized the Receivers to acquire out of available cash a portion of the outstanding Receivers' Certificates and certain of the secured issues of the Seaboard System, in addition to certain pledged collateral (in the amount of approximately $12,000,000). The Special Master made a Secondary Allocation of *these* released securities on the basis of relative earnings among only those secured issues which showed segregated *earnings during the period 1936 to 1940* and recommended a similar distribution of all ad-

*With the exception of $7,500,000 of Income Bonds which had been initially allocated as First Mortgage Bonds and which were classified into Income Bonds in the interests of conservatism; these bonds were all distributed on the basis of segregated earnings just as First Mortgage Bonds.

ditional securities released by subsequent wartime earnings.

Tertiary Allocation.

After the filing of the Special Master's Report, the "Virginia Court" directed the purchase by the Receivers of the remaining outstanding Receivers' Certificates (approximately $12,000,000 principal amount), That purchase, and certain *other modifications* of the Special Master's Plan providing for cash payments instead of the issue of sesurities to certain bond issues, released for redistribution First Mortgage Bonds and certain junior securities in excess of *$34,000,000* originally allotted to the purchased securities and to the securities for which cash payments were provided. The Tertiary Allocation distributed approximately one-third (less than $12,000,000) of the new securities and cash so released among all the various secured issues (including the Georgia and Alabama bonds) on the basis of the interest or dividends which would have been paid on the securities allocated to the respective issues if the plan had gone into effect on January 1, 1942. The balance and bulk of the surplus securities were redistributed under the Secondary Allocation.

Treatment of Georgia and Alabama Bonds.

The Georgia and Alabama Railway First Mortgage Consolidated Five Percent Bonds, Due October 1, 1945, represented by petitioners, are a *first mortgage lien* on approximately 393.53 miles of railroad in the States of Georgia and Alabama.

There are $6,085,000 Georgia and Alabama bonds issued and still outstanding with accrued interest due and unpaid in the sum of $3,803,125. The total claim amounted to $9,888,125 or $1,625 per $1,000 bond (as of January 1, 1944).

The Georgia and Alabama bonds do not receive the full amount of their claim in the new securities allotted to them in the modified and approved Plan of Reorganization.

The total face amount of securities allotted to the Georgia and Alabama bonds in the Primary Allocation was $6,008,185, consisting of the following junior securities: Income Bonds $1,599,640; Preferred Stock $659,797; and Common Stock $3,748,748.

The Georgia and Alabama bonds did not receive any First Mortgage Bonds under the Primary Allocation, because they showed no segregated earnings during the period 1936 to 1940 used as a basis for distribution. They similarly received no Income Bonds distributed on the basis of segregated earnings, but were allotted Income Bonds on the basis of their traffic contributions. They were allotted Preferred and Common Stock on the basis of their traffic contributions, and also on the basis of the physical value of their properties, but none on the basis of segregated earnings.

In the Primary Allocation each Georgia and Alabama $1,000 bond on which there was accrued principal and interest in the sum of $1,625 received the following:

Income Bond	$260.25
Preferred Stock	107.35
Common Stock	609.90
Total Face Value	$977.50

Under the Secondary Allocation, the Georgia and Alabama bonds received *no* additional securities, because they showed no segregated earning during the period 1936 to 1940, used as a basis to determine the reallocation of the released securities.

Under the Tertiary Allocation, the Georgia and Alabama bonds received in face amount the following additional securities:

First Mortgage Bonds	$357,408
Income Bonds	$ 13,983
Preferred Stock	$ 3,262
Common Stock	$ 28,614

Under the final Plan of Reorganization as modified and approved by the Courts, the bondholders of the Georgia and Alabama Railway received the following securities per $1,000 bond:

First Mortgage	*Income Bond*	*Pref. Stock*	*Com. Stock*
58.74	262.55	107.88	614.61

The total *face value* of the above securities consisting mostly of junior securities amounts to $1,043.78, whereas the total first lien claim of each Georgia and Alabama bond for principal, and accrued interest to January 1, 1944 is $1,625.

It is estimated that if the surplus securities distributed under the Secondary Allocation had been properly distributed, similarly to the method used in the Tertiary Allocation, the Georgia and Alabama Division would have received additional securities in the amount of at least $1,315,800 without taking into account the surplus cash released by wartime earnings in 1942, 1943, 1944 and 1945.

Proceedings Heretofore.

Appeals were taken by the petitioners from the orders of the "Virginia Court" (primary Court) and "Florida Court" (ancillary Court) approving the Plan of Reorganization as fair and equitable, since both were courts of original jurisdiction. The decree of the "Virginia Court" was affirmed by the Circuit Court of Appeals for the Fourth Circuit, *Badenhausen et al.* v. *Guaranty Trust Company et al.*, 145 F. (2d) 40. An application

for certiorari from the Fourth Circuit Court judgment was made to this Court and denied on January 8, 1945, 65 Sup. Ct. Rep. 440. The appeal in the Circuit Court of Appeals for the Fifth Circuit was stayed pending the determination of the appeal in the Circuit Court of Appeals for the Fourth Circuit and the certiorari to the Supreme Court therefrom. Thereafter, on March 10, 1945, the Circuit Court of Appeals for the Fifth Circuit heard the appeal on its merits and on April 10, 1945 affirmed the decree of the "Florida District Court," confirming and approving the Plan of Reorganization, 148 Fed. 2nd 450.

Since the denial of the previous application for certiorari in 65 Sup. Ct. Rep. 440, and the decision of the Circuit Court of Appeals for the Fifth Circuit which petitioners now seek to review, there have been decisions by other Circuit Courts of Appeals on the same matter and issues involved herein, which are in direct conflict with the decisions of the Circuit Court of Appeals for the Fifth Circuit and Fourth Circuit in these proceedings. These decisions relate specifically to the proper redistribution among the remaining several creditors of surplus securities and surplus cash released through wartime earnings in a railroad reorganization. In the interests of uniformity it is respectfully submitted that these questions should be finally and authoritatively settled by this Court.

This Court Has Jurisdiction.

The jurisdiction of this Court to review the judgment here in question is invoked under the Act of February 13, 1925, amending the Judicial Code, Sec. 240, Title 28, U. S. C. A., Sec. 347, and under Rule 38, subdivision 5, of the Rules of the Supreme Court.

The date of the entry of the judgment of affirmance of the Circuit Court of Appeals sought to be reviewed herein is April 10, 1945 (R. Vol. I, 637-641).

In the interest of brevity, petitioners respectfully refer the Court to the following portions of this petition for a complete statement of the actual grounds on which the jurisdiction of this Court is invoked under Rule 38, subdivision 5, of the Rules of the Supreme Court.

Questions Presented.

(1) Was the distribution of huge wartime earnings accumulated in 1942 and 1943 and the redistribution of more than $22,000,000 in surplus securities released or acquired through these wartime earnings, allocated by the Courts below to *only* those mortgage divisions which showed segregated earnings during the period 1936 to 1940, *fair and equitable*, particularly to those divisions whose properties admittedly produced the wartime earnings accumulated during 1942 and 1943 but which nevertheless failed to show segregated earnings during the pre-war period of 1936 to 1940, or was it discriminatory in favor of certain classes of creditors?

(2) Did the failure of the Courts below to provide for the distribution among the remaining creditors of

(a) the excess working capital and surplus current assets on hand;

(b) the surplus securities released by cash payments or provisions from the wartime earnings;

(c) the excess war earnings or profits which may reasonably be expected to accrue during the rest of the war period;

render the Plan of Reorganization unfair and inequitable and discriminatory, particularly as to those creditors who hold 1st mortgage liens and whose claims have not been fully provided for in the Plan of Reorganization?

(3) Did the District Courts and the Circuit Court of Appeals, in approving the Plan of Reorganization as fair and equitable, exercise an independent judgment based upon the evidence, or was the Plan accepted and approved as a compromise agreement to which most of the principal parties had consented in order to expedite the Reorganization?

Reasons Relied on for Allowance of Writ.

This case involves important questions of Federal Law on which a conflict exists between several Circuit Courts of Appeal on the same matter.

This Court has never decided the question of what constitutes a fair and equitable distribution among the remaining creditors of *realized* wartime earnings or a fair redistribution of securities provided for in an existing plan of reorganization and subsequently released by wartime earnings through cash provisions made in a railroad reorganization. Nor has this Court decided whether it is fair and equitable to secured creditors whose claims have not been fully paid or compensated in a plan of reorganization to permit excessive current assets and surplus working capital (obtained from wartime earnings and reasonably expected to accrue during the war period) to be carried forward in a reorganization and to inure to the benefit of those creditors whose claims have already been fully compensated in the plan of reorganization.

These questions are of paramount and vital importance in every existing railroad reorganization throughout the United States. These questions have not been, but should be, settled by this Court.

It is a matter of judicial and common knowledge that every railroad in the United States has benefited tremendously in traffic and earnings during the present wartime crisis. Since the Courts and the Interstate Com-

merce Commission in all receivership and bankruptcy cases have insisted upon a conservative recapitalization which will prevent the reoccurrence of any future bankruptcy or insolvency, the resulting effect has been that practically all railroads are carrying current assets and working capital, consisting of cash and current securities, far in excess of what is needed for the efficient operation of the road or its working capital. Consequently, virtually all railroads are today engaged in reducing their fixed charges and refinancing themselves by acquiring their outstanding secured issues or obligations carrying high interest charges at market prices generally far below their par value. In the case of railroads in reorganization, the securities so purchased or acquired by the receivers or trustees no longer require the new securities originally allotted to them in the plan of reorganization, and the surplus securities must be redistributed equitably among the remaining creditors.

In the instant case, the securities involved and to be reallocated in 1943 alone were in excess of $34,000,000. In addition, there remained many millions of dollars of excess current assets and working capital in the hands of the Receivers. Thereafter, in 1944, Seaboard acquired in net earnings an additional $24,000,000, and it is estimated that in 1945 its net earnings will approximate that of 1944. This condition has been true to a great extent in practically every railroad reorganization now pending.

No uniformity exists as to the method of distributing these surplus securities and funds. The method differs practically in several judicial circuits. In the "Milwaukee" case (*Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pac. R. R. Co.*) 318 U. S. 561, 563, this Court held that in principle the various creditors of the insolvent corporation should receive in the new securities to be issued by the new corporation the *equitable equivalent position* each formerly possessed. Unless the

surplus securities and excess funds obtained by the wartime earnings are fairly and equitably distributed, the remaining secured creditors who have not been fully compensated for their claims cannot receive in new securities the equitable equivalent position each formerly possessed, particularly when these secured creditors have substantially contributed to these wartime earnings.

In the instant case, under the Secondary Allocation adopted by the District Courts and sanctioned by the Circuit Court of Appeals, the *bulk* of these excess securities and surplus funds had been distributed to only mortgage divisions which showed earnings during the period 1936 to 1940, when the earnings were at a far lower level than the period during which the wartime earnings were accumulated. Many of the mortgage divisions (including the Georgia and Alabama Railway) showed no net earnings during the period 1936 to 1940 and were designated "deficit lines", whereas during the years when the wartime earnings were accumulated, the Georgia and Alabama Railway* and other so-called "deficit lines" admittedly became earning lines which produced much of the cash or excess securities now being distributed. Nevertheless, they fail to share or participate in this distribution.

Since the holders of securities whose properties have produced such earnings do not participate in the distribution of the earnings (or the surplus securities released by these earnings), they do not receive the equitable equivalent position they formerly possessed in accordance with the principles expressed by this Court in the "*Milwaukee*" case, *supra*, and the method of distribution adopted in these proceedings by the Courts below is in conflict with applicable decisions of this Court.

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*The record shows that the Georgia and Alabama division earned in 1942 3% of the total system revenue (R. Vol. I, 411).

There is no legal precedent or logical reason for this principle or method of distribution.

It is in conflict with similar distributions, such as that affirmed by the Circuit Court of Appeals for the Second Circuit in the case of *In re New York, New Haven & Hartford R. Co.*, 147 Fed. (2d) 40 (hereinafter referred to as the "New Haven case"). In the "New Haven case", the Interstate Commerce Commission, in its plan, proposed that the securities originally allotted, but released by cash payments made under order of the Court out of current earnings of the System, be redistributed among the remaining secured creditors not already awarded the full value of their claims ratably in proportion to the *amount* of their claims. Objection was made to the basis of this distribution. The District Court sustained this objection, 54 F. Supp. 607, 608, on the ground that a creditor whose security is the same in quantity and quality as that of his neighbor is not entitled to a more generous allotment of bonds simply because his claim is greater. The District Court decided that the redistribution of surplus securities be established by mathematical computations based solely upon the findings of the *values* of the several issues already made by the Commission and which constituted the foundation of the plan under consideration. The correction made by the District Court of the redistribution of excess securities was subsequently approved and modified by the Commission in its fifth supplemental report. The Circuit Court of Appeals, for the Second Circuit, specifically approved of this correction and distribution, 147 Fed. (2nd) 44.

On the other hand, the *Tertiary* Allocation recommended by the Compromise Committee in the instant case and approved by the Courts below, which distributed *less than $12,000,000* of the surplus securities and cash released by the wartime earnings, recognized the true principle of distribution adopted by the Second Circuit Court in the "New Haven case".

The Compromise Committee, in its Report, stated:

> "It may well be noted that as to the fundamental principle of fairness and equity in approving for distribution the abnormal war earnings to holders of securities *whose properties have produced such earnings,* generally similar proposals, different in method and form, have been made and have been or are being dealt with in railroad reorganization proceedings pending before the Interstate Commerce Commission and the federal courts" (R. Vol. I, 419). (Emphasis supplied.)

The Compromise Committee stated that it gave effect to this principle by the use of the Tertiary Allocation. The Tertiary Allocation redistributed the small amount of the released securities to which it applied among *all* the secured issues by mathematical computations based solely upon the findings of the *values of the several issues* in the Plan's two previous Allocations. This was done by the medium of distributing the released securities as if they were declared dividends which would have been paid on the securities allocated to the respective issues if the Plan had gone into effect on January 1, 1942. The Tertiary Allocation adopts and follows the principle of distributing surplus securities adopted in the "New Haven case", which was approved by the Circuit Court of Appeals for the Second Circuit (147 Fed. [2d] 40, 44). Conversely, the Secondary Allocation approved in the instant case by the Circuit Court of Appeals was contrary to the principles approved by the Circuit Court of Appeals for the Second Circuit and discriminated unfairly and failed to give due recognition to the rights of the Georgia and Alabama bondholders, in favor of other classes of creditors who, alone, showed segregated earnings during 1936 to 1940.

Petitioners likewise contend that the decision which they seek this Court to review is also in conflict with

the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of the *Denver and Rio Grande Western Railroad Company, et al.* v. *Insurance Group Committee, et al.*, ... Fed. (2d) ...* In the "Denver and Rio Grande" case, the Circuit Court of Appeals reversed the order of the District Court approving the plan of reorganization recommended by the Interstate Commerce Commission, because the plan *failed* to make equitable distribution among the remaining creditors of the surplus cash and current assets on hand; failed to make equitable and fair distribution of capitalized securities released through cash payment or purchase; and also because it failed to make equitable provisions for the distribution to the creditors whose claims had not as yet been paid in full of the excess war profits which may reasonably be expected to accrue during the war period.

The Plan of Reorganization approved in these proceedings by the Circuit Court of Appeals definitely makes no such provision and conflicts with the decision of the Circuit Court of Appeals in the "Denver and Rio Grande" case.

The petitioners contend that the decision in the instant case by the Circuit Court of Appeals further conflicts with the decision of the Second Circuit Court of Appeals in the "New Haven case" (*supra*), in that the approval of the Plan of Reorganization by the Courts below as fair and equitable was predicated substantially upon a compromise agreement assented to by a very large majority of the debenture holders. The *record* and the *opinion* filed by the "Virginia Court", which was confirmed and concurred in by the "Florida Court", makes it clear that the issues before the District Courts were decided not on a legal or judicial basis, but on a compromise basis, under the mistaken belief of the District Courts that it was the duty of the Courts to aid in effectuating the Plan

*Not as yet officially reported.

since a very large majority of the major secured creditors had assented to it.

In the "New Haven case", which was a bankruptcy case as distinguished from the instant case, the Second Circuit Court reversed the District Court order approving the plan in so far as the sale of the Old Colony Railroad (a leased line) was concerned, where the record indicated that the purchase price fixed by the Interstate Commerce Commission for the assets of the leased line was made not in the exercise of an independent judgment of the Commission, but predicated substantially upon the fact that the interested parties had agreed on its terms. The Circuit Court of Appeals for the Second Circuit held that the Interstate Commerce Commission must approve a plan of reorganization of a railroad as fair and equitable in the exercise of an *independent judgment*, uninfluenced by the fact that interested parties have agreed on its terms; otherwise, the plan could not be approved as fair and equitable.

Nevertheless, the approval of the instant Plan in Equity as fair and equitable seems to have been predicated by the Courts below substantially on the fact that most of the debenture holders had assented to the Plan and that just how the issues involved in the Plan could be adjusted was more a matter of good business judgment than of legal principle. In view of the record in this case, it cannot be maintained by the respondents that the approval of the Plan as fair and equitable by the Courts below was uninfluenced by the fact that most of the interested parties had agreed upon its terms.

Petitioners further contend that the approval of the Plan as fair and equitable by the District Courts predicated upon this compromise of only certain interested parties, and sanctioned by the Circuit Court of Appeals, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Petitioners further submit that the public interest in the uniformity of the administration of justice will be served by this Court's review and by the correction of the patent discrimination and injustice which petitioners believe to inhere in this proceeding.

CONCLUSION.

For these reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

Dated, July 3rd, 1945.

Respectfully submitted,

ABRAHAM MITNOVETZ,
Counsel for Petitioners.

Supreme Court of the United States

No. .....

Term A. D. 1944.

F. G. BADENHAUSEN, WILLIAM S. SPATCHER and HOWARD H. HUBBARD, constituting the Protective Committee for the Holders of Georgia and Alabama Railway First Mortgage Consolidated Five Percent Gold Bonds,

Petitioners and Appellants Below,

AGAINST

OTIS A. GLAZEBROOK, JR., JOSEPH FRANCE and CHARLES MARKELL, as the Reorganization Committee of the Seaboard Air Line Railway Company, *et al.*,

Respondents and Appellees Below.

Brief in Support of Petition for Writ of Certiorari.

ABRAHAM MITNOVETZ,
Counsel for Petitioners.

Brief in Support of Petition for Writ of Certiorari.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported in 148 Fed. Rep. (2d) 450. The opinion is also printed in full in the Record (R. Vol. I, 637-641). No opinion was filed by the District Court for the Southern District of Florida. The District Court for the Southern District of Florida and the District Court for the Eastern District of Virginia heard the matter jointly. The opinion of the District Court for the Eastern District of Virginia is printed in full in the Record (R. Vol. I, 81-145) (53 F. Supp. 672).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U. S. C. 347). A conflict exists between the Circuit Court of Appeals in this case and other Circuit Courts of Appeal on the same matter, which, in the interests of uniformity, this Court should finally and authoritatively settle (Supreme Court Rule 38[5][b]). The Circuit Court of Appeals has in this case decided important questions of Federal Law which have not been, but should be, settled by this Court. The decision is probably in conflict with applicable decisions of this Court (Supreme Court Rule 38 [5] [b]). A complete statement of the grounds on which the jurisdiction of this Court is invoked is contained in the petition filed herewith, *supra,* pages 18-24, petitioners respectfully request that said statement be deemed incorporated in the brief at this point.

Judgment was entered in this case by the United States Circuit Court of Appeals on April 10, 1945 (R. Vol. I. 637).

Statement of the Case.

The essential facts of the case are presented in the petition filed herewith (*supra*, pp. 1-16), which petitioners respectfully refer to and adopt as a part of this brief.

Specification of Errors.

(1) The Circuit Court of Appeals erred in approving and sanctioning the distribution by the Courts below of huge wartime earnings, accumulated in 1942 and 1943, and the redistribution of more than $22,000,000 in securities release through such wartime earnings, to only those mortgage divisions which showed segregated earnings during the period 1936 to 1940, particularly when many of the divisions, whose properties admittedly produced the wartime earnings accumulated during 1942 and 1943, failed to show segregated earnings during the pre-war period of 1936 to 1940. The Secondary Allocation, so approved by the Circuit Court of Appeals and the District Courts below, discriminated unfairly against the Georgia and Alabama Railway and other divisions whose properties admittedly produced the wartime earnings accumulated during 1942 and 1943 in favor of other classes of creditors.

(2) The Circuit Court of Appeals erred in affirming the Plan of Reorganization as fair and equitable, where the District Courts below failed to make any provision for the distribution of the excess current assets and working capital accumulated during the years 1942 and 1943 or for the subsequent wartime earnings which accrued (about $24,000,000 in 1944; approximately the same in

1945) to those secured creditors whose claims were not fully compensated in the Reorganization, but whose properties admittedly produced substantial portions of the huge wartime earnings realized.

(3) The Circuit Court of Appeals erred in approving the Plan of Reorganization adopted by the Courts below as fair and equitable, where the District Courts failed to exercise an independent judgment based upon the evidence, but accepted the Plan as a compromise agreement to which most of the interested parties had consented in order to expedite the Reorganization.

POINT I.

A conflict exists between several Circuit Courts of Appeal as to the proper distribution in a railroad reorganization of excess funds and surplus securities released by recent huge wartime earnings, which must be resolved by this Court.

It is a matter of judicial and common knowledge that every railroad in reorganization or otherwise has benefited tremendously in increased traffic and earnings during the present wartime crisis. Since the Interstate Commerce Commission must approve in all cases, both bankruptcy and receivership, the new capitalization of the reorganized railroad, the Commission and the Courts in all cases have insisted upon a conservative recapitalization—one which will prevent the recurrence of any future bankruptcy or insolvency. The resulting effect has been that practically all railroads now in the process of reorganization have been carrying current assets and working capital, consisting of cash and current securities, far in excess of what is needed for the efficient operation of the road. These earnings have made it possible for all railroads to reduce their

fixed debt substantially, and, in the case of reorganized railroads, to purchase their outstanding secured issues and obligations, which usually carry high interest charges, at market prices generally far below their par value. In the case of railroads in reorganization, the securities so purchased or acquired by the receivers or trustees no longer require the new securities originally allotted to them in the recapitalized plan of reorganization, and these surplus securities must be redistributed among the remaining creditors.

This Court has never decided the question of what constitutes a fair and equitable distribution of *realized* wartime earnings or a fair redistribution of surplus securities provided for in an existing plan of reorganization and subsequently released by wartime earnings, through cash provisions made in the railroad reorganization. Nor has this Court decided whether it is fair and equitable to secured creditors, whose claims have not been fully paid or compensated in a plan of reorganization, to permit excess current assets and surplus working capital (obtained from wartime earnings and reasonably expected to continue to accrue during the war period) to be carried forward in a reorganization and to inure to the benefit solely of those creditors whose claims have already been fully compensated in the plan of reorganization. The question as to whether wartime earnings (or securities released by purchases from wartime earnings) in a railroad reorganization should be distributed either on a relative *value* basis or on an *actual earnings basis* among all the mortgage divisions during those years when they were acquired, *or* whether the funds and securities so acquired should be distributed among the various divisions on a *pre-war earnings basis* (such as 1936-1940) and in different pre-war ratios, contrary to the actual facts, has never been adjudicated by this Court so far as our research indicates. These questions are paramount and vital issues in every existing

railroad reorganization in the United States and should be settled by this Court.

Moreover, a conflict exists between several Circuit Courts of Appeal on these questions involving the same matter.

Petitioners do not ask that current war earnings be taken as a measure of future earnings (which would in itself justify a larger authorized capitalization), but that proper recognition and distribution be given to earnings already *realized.*

As indicated in the instant case, huge amounts of cash have been rapidly accumulated by the Seaboard System from current earnings during the years 1942 ($34,000,000) and 1943 ($24,000,000). Much of this surplus cash was applied to the payment of senior claims and other secured obligations of the System, which materially reduced the claims which were originally admitted to participation in the new corporation and released equivalent amounts of surplus securities for redistribution among the various mortgage divisions. The securities so released for reallocation in 1943 alone were in excess of $34,000,000. In addition, there remained many millions of dollars of excess current assets and working capital in the hands of the Receivers. Thereafter, in 1944, the Seaboard System acquired in net earnings an additional $24,000,000, and it is estimated that in 1945 its net earnings will approximate that of 1944. This condition has been true to a great extent in practically every railroad reorganization now pending.

No unifomity exists as to the method of distributing these surplus securities and funds. The method differs in several judicial circuits. In the *Milwaukee* case (*Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pac. R. R. Co.*), 318 U. S. 561, 563, this Court held that in principle the various creditors of the insolvent corporation should receive in the new securities to be issued by

the new corporation the *equitable equivalent position* each formerly possessed. Unless the surplus securities and excessive funds obtained by the wartime earnings are fairly and equitably distributed, the remaining classes of secured creditors, who have not been fully compensated for their claims and who have contributed to these surplus funds and the release of these surplus securities, cannot receive in new securities the equitable equivalent position each formerly possessed.

In the instant case, under the Secondary Allocation adopted by the District Courts and sanctioned by the Circuit Court of Appeals, the bulk of these excess securities and surplus funds had been distributed to *only* mortgage divisions which showed earnings during the period 1936 to 1940, when the earnings were at a far lower level than the period during which the wartime earnings were accumulated. Many of the mortgage divisions (including the Georgia and Alabama Railway) showed no net earnings during the period 1936 to 1940 and were designated "deficit lines", whereas during the years when the wartime earnings were accumulated the Georgia and Alabama Railway and other so-called "deficit lines" admittedly became substantial earning divisions, which produced much of the cash or excess securities now being distributed. The record indicates without controversy that the Georgia and Alabama Railway earned in 1942 over $1,016,000 (R. Vol. I, 411), and in 1943 it was estimated that the Georgia and Alabama Division earned at least $1,500,000 (R. Vol. I, 370-371). Nevertheless, the Georgia and Alabama Division fails to share or participate in this distribution.

Since the holders of securities whose properties have produced such earnings do not participate in the distribution of the earnings (or surplus securities released by these earnings), they do not receive the equitable equivalent position they formerly possessed in accordance with the principles expressed by this Court in the "Milwaukee"

case, *supra*, and the method of distribution adopted in these proceedings by the Courts below is in conflict with applicable decisions of this Court.

There is no legal precedent or logical reason for this principle or method of distribution.

It is in conflict with similar distributions, such as that affirmed by the Circuit Court of Appeals for the Second Circuit in the case of *In re New York, New Haven & Hartford R. Co.*, 147 Fed. (2d) 40 (hereinafter referred to as the "New Haven case"). In the "New Haven case", the Interstate Commerce Commission, in its plan, proposed that the securities originally allotted, but released by payments under order of the Court out of current earnings of the System, be redistributed among the remaining secured creditors not already awarded the full value of their claims ratably in proportion to the *amount* of their claims. Objection was made to the basis of this distribution. The District Court sustained this objection, 54 F. Supp. 607, 608, on the ground that a creditor whose sesecurity is the same in quantity and quality as that of his neighbor is not entitled to a more generous allotment of bonds because his claim is greater. The District Court decided that the redistribution of surplus securities be established by mathematical computations based solely upon the findings of the *values* of the several issues already made by the Commission and which constituted the foundation of the plan under consideration. The District Court stated, 54 F. Supp. 608:

> "The distribution can also be shaped to preserve the same relationships in treatment between the bond issues affected as have already been approved by the Commission without resort to equations of equivalence not supported by the Commission's findings or to *methods* which I have found *not in conformity with legal standards.* These relationships

> can be established by mathematical computations based solely upon findings of the *values* of the several issues already made by the Commission and which indeed constitute the foundation of the very plan now under consideration." (Emphasis supplied).

The correction made by the District Court of the redistribution of excess securities was subsequently approved and modified by the Commission in its fifth supplemental report. The Circuit Court of Appeals for the Second Circuit, in approving of this correction and distribution, stated, 147 F. (2nd) 44:

> "We regard it as a commendable instance of properly coordinated action between the Court and the Commission, the importance of which was noted in *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 475."

On the other hand, the Tertiary Allocation recommended by the Compromise Committee in the instant case and approved by the Courts below, which distributed a small portion (less than $12,000,000) of the surplus securities and cash released by the wartime earnings, recognized the true principle of distribution adopted by the Second Circuit Court in the "New Haven case".

The Compromise Committee, in its Report, stated:

> "It may well be noted that as to the *fundamental principle of fairness and equity* in approving for distribution the abnormal war earnings to holders of securities *whose properties have produced such earnings*, generally *similar proposals*, different in method and form, have been made and have been or *are* being dealt with in railroad reorganization pro-

ceedings *pending* before the Interstate Commerce Commission and the Federal courts" (Vol. I, p. 419). (Emphasis supplied.)

The Compromise Committee stated that it gave effect to this principle by the use of the Tertiary Allocation. The Tertiary Allocation redistributed the small amount of released securities to which it applied among *all* the secured issues by mathematical computations based solely upon the findings of the *values of the several issues* indicated by the Plan's two previous Allocations. This was done by the medium of distributing the released securities as if they were declared dividends which would have been paid on the securities allocated to the respective issues if the Plan had gone into effect on January 1, 1942.

The Tertiary Allocation in substance adopts and follows the principle adopted in the "New Haven case", which was approved by the Second Circuit Court of Appeals (147 Fed. [2d] 40, 44). Conversely, the Secondary Allocation approved in the instant case by the Circuit Court of Appeals was contrary to the principles approved by the Second Circuit Court, and discriminated unfairly and failed to give due recognition to the rights of the Georgia and Alabama bondholders, in favor of other classes of creditors who, alone, showed segregated earnings during 1936 to 1940.

Petitioners likewise contend that the decision which they seek this Court to review is also in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of the *Denver and Rio Grande Western Railroad Company, et al.* v. *Insurance Group Committee, et al.*,* .... Fed. (2d) .... In the "Denver and Rio Grande" reorganization, the Circuit Court of Appeals reversed the order of the District Court approving the plan of reorganization, because the plan failed to

*Not as yet officially reported.

make equitable distribution of the excess cash and surplus current assets on hand, failed to equitably distribute surplus securities released by subsequent cash payments, and failed to make equitable provisions for the distribution, to the creditors whose claims had not as yet been paid in full, of the excess war profits which may reasonably be expected to accrue during the war period. The Circuit Court stated:

> "The mere fact, however, that cash and current assets are not required to be reflected in the capital structure in the form of capitalized value does not remove them from the picture. They are nevertheless assets of the corporation which must be taken into account in drawing up a fair and equitable plan of reorganization, and must be distributed in a manner that is fair and equitable to all classes of creditors. * * * Adequate operating funds are essential to the operation of a railroad. The Senior Bondholders were entitled to receive in addition to the full amount of their claims, working capital sufficient for proper and efficient operation of the railroad. But anything in *excess* of what was reasonably necessary for this purpose constituted assets of the insolvent corporation which belonged to the remaining creditors."
>
> "* * * While these increased net earnings are due in large part to the war and will not continue after the end of the war, and may therefore be disregarded in setting up the capitalized structure based upon prospective earnings, we cannot disregard the fact that these *huge surpluses actually exist.* Their existence is an accomplished fact. It is also obvious that surpluses will continue to pile up for a reasonable time yet to come. We think any plan which fails to take this into account and which

gives the Senior Bondholders their claims in full by substantially delivering the road to them, and gives them the surplus cash actually on hand and further enables them to receive in addition the excess war profits which are reasonably sure to come, is inherently inequitable and unfair, so long as there are classes of creditors whose claims are not fully satisfied." • • •

"The inherent weakness in the plan was not only that it did not make equitable distribution of the excess current assets on hand, but also that it failed to provide for the equitable distribution of excess war profits which could reasonably be expected to accrue during the rest of the war period." (Emphasis supplied.)

In the *Florida East Coast* case, the Commission's plan (effective date December 1, 1940) fixed the new capitalization of the reorganized company at $37,000,000. By the time the Commission's plan came before the Court for consideration, the available net income had jumped from less than one million to over 9 million dollars a year. The cash on hand had climbed from about 1¼ millions to over 17¾ millions.

The Court found that this great accumulation of cash not only made it necessary to give the old junior bonds more and better new securities, but required many other major changes. On motion, the Court sent the plan back to the Commission.

Judge Strum in the *"Florida"* case said in part, 52 F. Supp. 422-423:

"This sum of $17,795,365 on hand October 1, 1943, is an existing fact, not a prophecy. • • •

• • • • • •

"This cash represents net earnings of the company, on which the bondholders have a lien. To the extent that it is prudently available, the bondholders are entitled to the benefit of this surplus cash, either by having it applied in an equitable manner in satisfaction of their claims, or by having it otherwise definitely allocated by the Commission as a component part of the reorganization plan, so that it may be equitably applied to the best advantage of all concerned. * * * *To approve the present plan, ignoring the existence of this fund, would be improvident and inequitable to all security holders, especially to the minority. Such a course would not afford due recognition to the rights of the present bondholders, who have liens on these funds.*" (Emphasis supplied.)

It will be noted that in the instant case the excess current assets and surplus working capital are carried forward in the Reorganization and inure to the benefit of those creditors whose claims have already been fully compensated in the Plan of Reorganization.

It will be further noted that if no other disposition is made of the surplus securities released by subsequent cash provisions in the Plan of Reorganization and they remain undistributed, the value behind them will *inure* to the further benefit of the remaining creditors whose claims have already been *fully compensated* in the Plan. In effect, therefore, payment upon payment is being made to those secured creditors who have already been fully compensated for their claims. These mortgage divisions receive far more than the total amount of their principal and accrued interest, and, in fact receive a *bonus*, whereas many of the mortgage divisions which are first liens of equal rank have still not been paid their claims in full.

Such principles or methods of distribution are clearly unfair and inequitable and discriminate against the Georgia and Alabama Division and other first mortgage lines whose claims have not been paid in full. They are probably in conflict with applicable decisions of this Court as indicated in the "Milwaukee case", *supra*.

A conflict unquestionably exists between various Circuit Courts of Appeal, not only with respect to the equitable distribution of excess current assets on hand or surplus securities released by the wartime earnings, but also with respect to the equitable distribution of excess profits which can reasonably be expected to accrue during the rest of the war period. An anomalous situation has arisen whereby a creditor in one judicial circuit, whose security is the same in quality and quantity as that of his neighbor, may receive a far more generous allotment of securities than his neighbor if his claim happens to arise in another judicial circuit where the method of distribution is entirely different. The consequences have been and are so disastrous to railroad investors, and so dangerous to the credit of the railroads in general, that they should be corrected and finally settled by this Court. The public interest in the uniform administration of justice further demands that this conflict be resolved.

POINT II.

A Plan of Reorganization could not be approved as fair and equitable where the District Courts in approving the Plan did not exercise an independent judgment, but accepted a compromise agreement recommended by some of the interested parties.

Petitioners contend that the Circuit Court of Appeals' decision in the instant case further conflicts with the decision of the Circuit Court of Appeals for the Second Cir-

cuit in the "New Haven case", 147 Fed. Rep. (2d) 40, in that the approval of the Plan of Reorganization by the District Courts in these proceedings was predicated substantially upon a compromise agreement assented to by a majority of the principal secured creditors.

In the "New Haven case", a bankruptcy case as distinguished from the instant case, the Circuit Court held that the Interstate Commerce Commission must approve a plan for the reorganization of a railroad in the *exercise of an independent judgment,* uninfluenced by the fact that the principal interested parties have agreed on its terms. The "New Haven" plan provided for the purchase of a leased line ("Old Colony"). The Interstate Commerce Commission was required to approve and fix a purchase price for the assets of this leased line. The Circuit Court of Appeals held that the record clearly indicated that the purchase price fixed by the Interstate Commerce Commission for the assets of this leased line was predicated substantially upon a compromise agreement made by some of the principal interested parties. The Second Circuit Court of Appeals, in holding that the Interstate Commerce Commission must approve a plan of reorganization of a railroad in the exercise of an independent judgment, uninfluenced by the fact that interested parties have agreed on its terms, stated:

(p. 49)

> "Section 77 requires an independent determination by the Commission that the plan is 'fair and equitable'. The heart of such a determination is a finding of fact by the Commission as to the value of the debtor's property. It follows that that finding cannot be based upon the consent of some of the interested parties but must be a conclusion independently reached by the Commission upon a consideration of the evidence. One of the purposes of

section 77 was to do away with an evil prevalent in reorganization through equity receivership proceedings, namely, the customary practice of submitting to the court a plan already consented to by a large proportion of the old security holders and thus exerting pressure on the court to approve it against objections of minorities, because failure to do so would mean the upsetting of a *fait accompli* and the undoing of an immense amount of effort and negotiation. See *New England Coal & Coke Co.* v. *Rutland R. Co.*, 2 Cir., 143 F. 2nd 179, 188; Fuller, The Background and Techniques of Equity and Bankruptcy Railroad Reorganizations—A survey, 7 Law and Contemporary Problems (1940) 377, 384; S. E. C. Report on Protective and Reorganization Committees, Part VIII, 152."

* * * * *

(p. 50)

"We cannot read this otherwise than as meaning that the Commission accepted the compromise of the joint report for fear that any material modification of it, which the Commission might have independently approved as fair and equitable, would be unacceptable to the parties and would result in delay in consummation of a reorganization. That is to say, the Commission was influenced by the pressure of the compromise agreement and by the fear that a large block of security holders of New Haven would not consent to a plan materially different."

The Record in these proceedings clearly indicates that the issues before the District Courts were decided not on a legal or judicial basis but on a *compromise basis*, due to the mistaken belief of the District Courts that it was the duty of the Courts to approve the Plan since a very large

majority of the secured creditors had assented to it and the reorganization would consequently be expedited. The District Courts repeatedly stated that the manner in which the issues involved could be adjusted was more a matter of good business judgment than of legal principle. The opinion filed by the "Virginia District Court", confirmed and concurred in by the "Florida District Court", substantiates this fact. In approving the Plan as fair and equitable, the "Virginia Court" opinion stated:

> "The major questions arising on the exceptions to the master's report were the conflicting contentions between the underlying bonds as represented by the general counsel for the Committee for those bonds and counsel for the general mortgage bonds. The report of the Conference Committee shows that these conflicting contentions have now been harmonized *if the plan can now be consummated without substantial modification.* * * * Secondly, the other important feature of the plan is *not primarily a matter of public interest but of private business interests of the secured creditors.* * * * *Of those who have participated the very great majority have approved the plan as modified*" (R. Vol. I, 133-134).
>
> * * * * * *
>
> "The problems involved in the plan for allocation of the new securities are intricate in detail. They are, however, to a *very large extent problems of business interests* rather than controlled by definite rules of law. * * * It is utterly improbable that any plan could be devised which would give entire satisfaction to all of the numerous and diverse creditors' interests here involved. * * * It is of the utmost business urgency in the interests of all the bondholders of all classes that the reorganization

should be speedily consummated at the present time of favorable earnings" (R. Vol. I, 136-137).

* * * * *

"At present the most obvious single fact is the great importance of *speedily accomplishing the reorganization* consistent with due regard for equitable and fair treatment of the diverse interests. The principal objection to now proceeding under section 77 is the anticipated further protracted delay that would seem to be probably incident to an entirely new proceeding before the Commission. * * * *Whether the same result would obtain now, in view of the very substantial agreement* as to the plan of reorganization by the *major conflicting interests,* and the clarification of the whole subject by the recent decisions of the Supreme Court, makes the prediction as to the extent of the delay more uncertain. * * * The division of the new securities is *primarily a matter for the parties themselves.* There is some reasonable basis for the hopeful thought of the parties that equity reorganization can be consummated within a comparatively short time. * * * As a matter of personal preference the court would prefer to have the procedure in bankruptcy rather than in equity, but as the *allocation of the new securities is a matter primarily of individual rather than public interest,* the court is hesitant to deny to the interested parties a reasonable opportunity to consummate the reorganization, as they think will be possible, much more speedily than they anticipate would be possible through bankruptcy" (R. Vol. I, 140-141).

* * * * *

"A period of a few months should be sufficient to test out the question whether sufficient now out-

> standing bonds will voluntarily participate in the plan. If they do not, the necessary alternative will be bankruptcy procedure. If resort must be had to that, with the result that some substantially different plan is formulated, there is *no present certainty that the present large majority approval would be secured for a substituted plan.* If not, indefinite further long delay is inevitable. As has been said, the major and dominant consideration seemingly in the interests of all is to promptly consummate the plan while the scale of railroad earnings is so fortunate." (R. Vol. I, 142). (Emphasis supplied.)

The District Courts' hearings on the exceptions to the Special Master's Report and Plan of Reorganization were held between October 25, 1943 and November 5, 1943. The District Courts' hearings on the modifications recommended by the Compromise Committee were held between November 29, 1943 and December 1, 1943. At the close of the hearings on the exceptions to the Special Master's Plan, on November 5, 1943, the Court rendered its tentative views on the issues involved in these proceedings. In discussing the unfairness of the results of the Special Master's Plan with respect to the Georgia and Alabama Railway, the Virginia Court stated:

> "Furthermore, I think that a great deal of influence ought to be given to the recent earnings which are now causing emphasis on the contest that we have. Just how those recent earnings ought to be influential in what is the final allocation of securities is largely a business question. I think we were told during the hearings that the *Georgia & Alabama had made net earnings of something over a million dollars in the last year or two* and that they are awarded securities on the basis here in the plan

which would not amount to much more than that; furthermore, that the *scrap value* of the Georgia & Alabama is pretty nearly as much as the market value of the securities that are awarded to it. Those things *cry out for adjustment* and just how they can be adjusted is much more a matter of good business judgment than it is merely of legal principles" (R. Vol. I, 360). (Emphasis supplied.)

The only modification recommended by the Compromise Committee at the subsequent Court hearing, November 29th to December 1st, which benefited the Georgia and Alabama Division in any respect was the Tertiary Allocation. As previously stated, the Tertiary Allocation distributed only a small portion (less than $12,000,000) of the excess securities released by the wartime earnings in 1942 and 1943. The treatment given to the Georgia and Alabama Division under the Tertiary Allocation was *relatively poorer* than that made to most of the other divisions, because the Tertiary Allocation was predicated upon the two previous Allocations, to wit, the Primary and Secondary Allocations, and the Georgia and Alabama Division received no securities under the Secondary Allocation (which distributed the bulk of the excess securities released from wartime earnings), since it showed no segregated earnings during the period 1936 to 1940.

The foregoing excerpts from the Primary District Court's opinion and the Record clearly indicate that the District Courts approved the Plan for two basic reasons: (1) The principal interested parties had agreed upon the Plan's terms and there was no certainty that the present large majority approval would be secured for a substituted Plan if there were any material modifications; and (2) The Plan of Reorganization would be expedited during the present period of favorable earnings.

As stated by the Circuit Court of Appeals for the Second Circuit "That it was improper for the equity court to

yield to such pressure was clearly shown in *First Nat. Bank* v. *Flershem*, 290 U. S. 504, at page 525, 54 S. Ct. 298, at page 306, 78 L. Ed. 465, 90 A. L. R. 391 by the statement: 'The failure to secure an adequate price seems to have been due, not to lack of opposing evidence, but to the mistaken belief that it was the duty of the court to aid in effectuating the plan of reorganization, since a very large majority of the debenture holders had assented to it.' See also *National Surety Co.* v. *Coriell*, 289 U. S. 426, 436."

CONCLUSION.

For these reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM MITNOVETZ,
Counsel for Petitioners.

July 3rd, 1945.

Supreme Court of the United States

OCTOBER TERM, 1945

No. 213

F. G. BADENHAUSEN, WILLIAM S. SPATCHER and HOWARD H. HUBBARD, constituting the Protective Committee for the Holders of Georgia and Alabama Railway First Mortgage Consolidated Five Per Cent. Gold Bonds,

Petitioners and Appellants Below,

against

OTIS A. GLAZEBROOK, JR., JOSEPH FRANCE and CHARLES MARKELL, as the Reorganization Committee of the Seaboard Air Line Railway Company, et al.,

Respondents and Appellees Below.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1945

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Opinions Below

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported in 148 Fed. (2d) at page 450. It is printed at R. Vol. I, pages 637 to 639. The Decree of the District Court of the United States for the Southern District of Florida (hereinafter called the Florida Court), which was affirmed by the Circuit Court of Appeals for the Fifth Circuit, is printed in the record at Vol. I, pages 15 and 16.

That Decree of the Florida Court confirmed a Decree of the District Court of the United States for the Eastern District of Virginia (the court of primary jurisdiction in the Seaboard receivership proceedings, which is hereinafter called the Virginia Court). The Virginia Court's decree is printed in the record at Vol. I, pages 1 to 14.

The opinion of the Virginia Court is printed in the record at Vol. I, pages 81 to 145, and reported as *Guaranty Trust Co. of New York, et al.* v. *Seaboard Air Line Ry. Co. et al.*, in 53 Fed. Supp. 672.

Jurisdiction

Petitioners invoke the jurisdiction of this Court under Section 240 (a) of the Judicial Code (28 U. S. C., Section 347).

Brief Statement of Facts

Proceedings in equity looking toward the reorganization of Seaboard Air Line Railway Company (hereinafter called Seaboard) were instituted in December, 1930, in the Virginia Court. At the same time ancillary proceedings were instituted in the Florida Court.

In 1943 the Virginia Court entered a Decree (R. Vol. I, page 1), dated December 10, 1943, approving a plan of reorganization of Seaboard. The Florida Court entered a Decree dated December 14, 1943, adopting and confirming the Decree of the Virginia Court (R. Vol. I, page 15). Those Decrees are hereinafter called the Virginia Decree and the Florida Decree, respectively.

These petitioners appealed severally from the Virginia Decree and the Florida Decree, which confirmed the Virginia Decree, raising identical issues on each of the appeals.

The two appeals involved substantially the same parties. The appeal from the Virginia Decree was argued before the Circuit Court of Appeals for the Fourth Circuit in June, 1944. That Court affirmed the Virginia Decree in *Badenhausen et al.*, v. *Guaranty Trust Company of New York, et al.*, 145 Fed. (2d) 40 (1944).

Thereupon these petitioners applied for certiorari to the Circuit Court of Appeals for the Fourth Circuit, raising in substance, the same questions which they seek to raise in their pending petition. That petition was docketed as "*Badenhausen et al.* v. *Guaranty Trust Company of New York, et al.*, No. 720, October Term, 1944" and is hereinafter referred to as Case No. 720. This Court denied that petition on January 8, 1945. *Badenhausen et al.*, v. *Guaranty Trust Co. et al.*, 323 U. S. 797.

Petitioners' appeal from the Florida Decree confirming the Virginia Decree was argued before the Circuit Court of Appeals for the Fifth Circuit early in 1945, and on April 10, 1945, the Circuit Court of Appeals for the Fifth Circuit handed down its opinion affirming the Florida Decree (R. Vol. I, page 637; *Badenhausen et al.*, v. *Glazebrook, et al.*, 148 Fed. (2d) 450). It is on that opinion that the pending petition for certiorari is based.

The Circuit Court of Appeals for the Fifth Circuit did not consider any of the questions presented by the appellants (the petitioners herein) relating to the merits of the Reorganization Plan. That Court affirmed the Florida Decree on the ground of comity, saying:

> "The questions all relate to the equitable sharing among all the lienholders of the new securities proposed to be issued, and are such that any court having the parties before it might decide. They are questions pertaining to the general policy and dis-

> position of the receivership, most proper to be decided by the court having the primary receivership. They have been there decided carefully and fully. Ancillary receiverships are generally conducted in harmony with the court having original jurisdiction of the primary receivership, and the Federal Court of the Southern District of Florida, and this Court on appeal, out of comity and in the interest of efficient handling of the receivership property as a whole or as a unit, should follow the decision thus made, unless we should find that there was oversight or clear disregard of the rights of local creditors in the property subject to the ancillary receivership. This we do not find and there was no reversible error in the lower Court in following the decision of the Fourth Circuit in the reorganization proceedings. * * *"

It is, therefore, apparent that none of the questions which petitioners seek to have this Court review was actually decided by the Circuit Court for the Fifth Circuit. If this Court should review the decision of the Fifth Circuit Court of Appeals, the only question to be considered could be whether that Court properly applied the doctrine of comity or had a duty to reexamine the questions relating to the fairness of the Reorganization Plan which had already been passed on by the Fourth Circuit Court of Appeals, with certiorari denied by this Court. *That question is not even raised by the petitioners. It is clear, therefore, that the petition presents no basis for the issuance of a writ of certiorari.*

Petitioners are really asking this Court to reconsider its refusal to grant certiorari to the Fourth Circuit Court of Appeals in Case No. 720. That attempt is consistent with their whole policy of seeking to relitigate, in Court after

Court, the same questions which were painstakingly considered and decided against them by the Virginia Court and the Florida Court and by the Fourth Circuit Court of Appeals.

This is the third petition for a writ of certiorari which has been filed by these petitioners in connection with the Seaboard reorganization. The first petition was in Case No. 720. The second petition was in a case known as *Badenhausen, et al.* v. *Baetjer, et al.*, docketed as No. 1091, October Term, 1944, involving a controversy between these petitioners and a bondholders' committee known as the Underlying Bondholders' Committee. Certiorari was also denied in that case on April 23, 1945 (65 Sup. Ct. Rep. 1029).

Since the decision of the Fifth Circuit Court of Appeals the property of Seaboard has been sold to the Reorganization Committee under the Reorganization Plan pursuant to a Final Decree of Foreclosure and Sale dated April 12, 1945, entered by the Virginia Court and the Florida Court. The time to appeal from that decree has expired and no appeals have been taken. The sale of the property to the Reorganization Committee was confirmed by order of the Virginia Court and the Florida Court dated June 29, 1945, and it is anticipated that the reorganization of Seaboard (after almost fifteen years in the Courts) can be completed within the next six months.

In view of the basis on which the Fifth Circuit Court of Appeals decided this case it seems unnecessary to burden this Court with any detailed statement of facts relating to the method of distribution of securities under the Reorganization Plan. A summary statement of such facts is contained in the brief filed on behalf of certain of these re-

spondents and others, dated December 26, 1944, in Case No. 720.

Although, as pointed out above, the Fifth Circuit Court of Appeals did not consider or pass on any of the questions which the petitioners seek to raise, we shall point out briefly below, under Points II and III, that none of those questions presents any issue which would be a basis for certiorari, even if they had been passed on by the Court below.

ARGUMENT

POINT I

No question is raised by the decision of the Circuit Court of Appeals for the Fifth Circuit except the proper application of the rule of comity. That question is not presented to this Court by the petition.

The Circuit Court of Appeals for the Fifth Circuit found it unnecessary to pass on any of the questions presented to it as to the merits of the Seaboard Plan. It agreed with the argument made by the appellees that the doctrine of comity required it to follow the decision of the Circuit Court of Appeals for the Fourth Circuit in a proceeding between the same parties and involving the identical questions unless it were shown that there was "oversight or clear disregard of the rights of local creditors in the property subject to the ancillary receivership." The Court found no such oversight or disregard.

The decision of the Fifth Circuit Court of Appeals was clearly correct. *Beard* v. *Bennett*, 114 Fed. (2d) 578 (U. S. C. A., D. C., 1940); *Louisville & Nashville R. Co.* v. *Western Union Tel. Co.*, 233 Fed. 82 (C. C. A., 5, 1916),

aff'd 250 U. S. 363 (1919); *Stanolind Oil & Gas Co.* v. *National Labor Relations Board,* 116 Fed. (2d) 274 (C. C. A., 5, 1940); *Cottman Co.* v. *Dailey,* 94 Fed. (2d), 85 (C. C. A., 4, 1938).

The petition herein does not raise the question whether the Fifth Circuit Court of Appeals correctly applied the rules of comity and, since no other question was involved in the decision of that Court, there is no basis for certiorari.

POINT II

The provisions of the Seaboard Reorganization Plan relating to the disposition of surplus cash and securities resulting from war earnings are entirely consistent with the principles applied by the courts in the New Haven and Denver reorganizations.

Petitioners lay great stress on their claim that the decisions of the Virginia and Florida Courts approving the Seaboard Plan are inconsistent with the decisions of Courts in other Circuits in the *New Haven* and *Denver* reorganizations, referring to *In re New York, New Haven & Hartford R. Co.,* 147 Fed. (2d) 40, (C. C. A. 2, 1945); *In re New York, New Haven & Hartford R. Co.,* 54 Fed. Supp. 595 (D. C. Conn., 1943) and *In re Denver & Rio Grande Western Railroad Company* v. *Insurance Group Committee* (C. C. H. Bankruptcy Service, p. 57542; (C. C. A. 10, 1945); Petition for certiorari pending).

It is clear that there is no conflict between the decisions referred to above and the provisions of the Seaboard Plan relating to the distribution of surplus cash and securities resulting from war earnings.

The *Denver* case decided that a plan was not fair which substantially excluded junior creditors and gave to senior creditors not only new securities equal to the full amount of their claims but also the benefit of substantial accruals of war earnings not needed for the operation of the property. *The Court in the Denver case did not consider or decide the basis on which the surplus earnings should be divided among the several classes of creditors.*

The Seaboard Plan makes provision for the distribution of surplus cash resulting from war earnings. Prior to the approval of the Plan a substantial amount of such cash had been applied to the retirement of outstanding securities. Petitioners admit that all the securities released for reallocation by that application of cash were redistributed among outstanding claimants, which was entirely in accordance with the *Denver* case. As to war earnings prior to the approval of the Plan, their only complaint is as to the method of distribution, on which the Court did not pass in the *Denver* case.

The petitioners contend that no adequate provision is made for distribution of excess earnings accruing subsequent to the approval of the Seaboard Plan. That argument has no basis in fact. Section VI of the Seaboard Plan (R. Vol. I, pages 45 to 47) expressly provides that cash available for distribution may be distributed among the creditors of the various classes, including the Georgia & Alabama Bonds owned by these petitioners, in the percentages specified in Section VI. The petitioners do not question the fairness to them of those percentages. The Reorganization Committee has announced its intention to distribute any excess cash in accordance with Section VI.

The District Court in the *New Haven* case disapproved the reorganization plan approved by the Interstate Commerce Commission because excess securities which became available because of the use of war earnings to reduce claims were distributed among certain classes of creditors in proportion to the *amounts* of their claims rather than in proportion to the *value of the security* for their claims. Petitioners state that that decision was "specifically approved" by the Circuit Court of Appeals for the Second Circuit. In fact, the question was not mentioned in the opinion of the Circuit Court of Appeals. That, however, is unimportant, because petitioners do not point out any respect in which the Seaboard Reorganization Plan violates the rule laid down by the District Court in the *New Haven* case. In fact it does not violate that rule. The so-called Secondary and Tertiary Allocations referred to by the petitioners (which represented the distribution of excess securities created because of use of war earnings to reduce outstanding claims) were not based on the *amounts* of the various claims but were based (as petitioners themselves admit) on the determinations of the Special Master and of the Virginia and Florida Courts as to the *value of the security* for the various classes of claims. There is, therefore, no conflict with the decisions in the *New Haven* case.

POINT III

The Seaboard Reorganization Plan was approved by the District Courts in the exercise of their independent judgment.

Petitioners allege that the issues before the District Courts in this case were decided on a "compromise basis"

because the Courts accepted certain recommendations of a so-called "Compromise" or "Conference" Committee as to modifications of the Plan recommended by the Special Master. It is also alleged that for that reason the decision of the Circuit Court of Appeals for the Fifth Circuit affirming the Florida Decree is inconsistent with the decision of the Circuit Court of Appeals for the Second Circuit in the *New Haven* case (147 Fed. (2d) 40), because in that case the Circuit Court of Appeals for the Second Circuit sent the reorganization plan back to the Interstate Commerce Commission for additional findings as to the value of the Old Colony property, which Section 77 required the Commission to make, since the Circuit Court of Appeals was not satisfied from the state of the record that the Commission had exercised its own independent judgment, as it is required to do. The Circuit Court of Appeals was careful to point out, however, that, of course, it was possible that in exercising its independent judgment, the Commission might well reach the same valuation.

That same attack on the use of the Conference Committee was made by these petitioners in their petition to this Court in Case No. 720 and the facts are fully set out in the brief of respondents in Case No. 720 at pages 12 to 17, inclusive. It seems clearly unnecessary to discuss it further in this brief. This Court was satisfied when it considered Case No. 720 that the procedure adopted by the District Courts and approved by the Circuit Court of Appeals for the Fourth Circuit with relation to the Conference Committee did not involve any question justifying the issuance of a writ of certiorari. There has been no change in the problem presented, and there is no basis for the allegation that the Virginia Court and the Florida Court did not exer-

cise their independent judgment. They heard testimony and argument for many days and the opinion of the Virginia Court (R. Vol. I, pp. 81-145) shows how carefully all questions raised were considered and analyzed.

The *New Haven* case is not in point. The question there considered was whether the Interstate Commerce Commission had performed the duty imposed on it by statute.

Moreover, as pointed out above, the question is not before this Court in this case, since it was not decided or considered by the Circuit Court of Appeals for the Fifth Circuit.

CONCLUSION

There is no ground for granting the petition.

Paragraph 5 of Supreme Court Rule 38 states that a review on a writ of certiorari will be granted only when there are special and important reasons therefor. There are no such reasons in this case. This Court so decided when it denied certiorari in Case No. 720, in which petitioners raised, in substance, all of the questions which they now seek to raise again.

Moreover, writs of certiorari are granted only to review questions decided by the Circuit Court of Appeals to which the writ is directed. In this case the Circuit Court of Appeals for the Fifth Circuit did not pass on or decide any of the questions which petitioners seek to have reviewed by this Court. Even if certiorari were granted, this Court could only consider the single question raised by the opinion of the Circuit Court of Appeals for the Fifth Circuit,

i.e., whether the doctrine of comity required or permitted that Court, in the circumstances of this case, to follow the decision of the Circuit Court of Appeals for the Fourth Circuit. That question forms no basis for the issuance of a writ of certiorari and has not even been raised by the petitioners.

Dated August 20, 1945.

Respectfully submitted,

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